IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED NO

DATE: 24 November 2022.....

SIGNATURE:.....

Case No. 65535/2014

In the matter between:

DE BEER, DEON **APPLICANT**

And

GELDENHUYS, LEENDERT **RESPONDENT**

REASONS FOR JUDGMENT

MILLAR J

1. This is an application for the rescission of a court order made by consent between the applicant and the respondent. On 7 March 2017 the applicant and the respondent

entered into an agreement to settle liability in an action for damages that the respondent had instituted against the applicant. The settlement was made an order of court on that day. The reason that the action had been instituted by the respondent against the applicant was as a consequence of injuries sustained by him in a 'road rage' incident that had occurred on 3 November 2013.

2. The order that the applicant sought to rescind provided *inter alia* as follows:

> *"1. It is hereby declared that:*
>
> *1.1 the defendant unlawfully and intentionally assaulted the plaintiff on 3 November 2013 at approximately 17h30;*
>
> *1.2 the plaintiff did not initiate a road rage incident as aggressor;*
>
> *1.3 the defendant did not act in self defence;*
>
> *1.4 the plaintiff did not consent to be subjected to the risk of injury;*
>
> *1.5 the plaintiff did not contribute to the damages which the plaintiff has suffered."*

3. The applicant was represented by senior counsel and an attorney on 7 March 2017 and it was contended by him that he had been advised by them to agree to the terms of the order on the basis that it would not prejudice his defence in the action for damages.

4. The basis for this advice was that there was no admission as to causation between the incident and the damages and that this would still have to be proved. This occurred in the context of the matter having been postponed on a prior occasion at the instance of the applicant and the refusal on 7 March 2017 of a further postponement requested by him.

5. On 14 November 2017 the applicant was now on trial in the criminal court for what had occurred on 3 November 2013. He pleaded that day and the respondent was called by the state to testify. During the evidence of the respondent, the attorney representing him in that case informed him that he ought not to have consented to the order of 7 March 2017. This advice resonated with him and when certain aspects of the respondent's evidence were regarded as unsatisfactory during the criminal trial, the applicant found himself having a 'Damascus Moment' and decided to bring the present application.

6. Despite his realization that an application for rescission would have to be brought, it was not brought for almost 18 months. Although some explanation was proferred about the challenge in obtaining transcripts from the criminal court, no proper basis was laid for this and it was not substantiated. There was no substantive application for condonation although this was belatedly raised and sought in the applicant's heads of argument.

7. The respondent opposed the present application and besides filing an answer, also brought an application to strike out certain scandalous allegations made by the applicant. This all occurred on 3 December 2019. No opposition was entered to the application to strike out and no replying affidavit was filed. It is trite that the present application is accordingly to be decided on the respondent version.[1]

8. The applicant appears to have lost interest in pursuing the present application at that point and no further steps were taken by him. The consequence was that the main action for the determination of damages was paralyzed from further conduct. It was left to the respondent to bring an application to compel the applicant to comply with the practice directives of this court on 22 March 2022, so that he could have the application set down for hearing.

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[1] Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd 1984 (3) SA 623 (A)

9. The basis upon which the applicant contended that the consent order should be rescinded was *iustus error*. The error, in consenting, was alleged to be in consequence of the advice he had been given by his senior counsel, a *sine qua non* for his agreeing to the consent order. The applicant was unable to refer me to any specific authority to support this proposition

10. The respondent for his part, besides persisting with the application to strike out certain statements in the applicant's founding affidavit, also opposed the recission of the order. It was argued for the respondent that the allegation by the applicant that he had relied on incorrect advice was of no assistance to the applicant.

11. It was held in CF Gollach & Gomperts v Universal Mills & Produce Co.[2] that:

"Voluntary acceptance by parties to a compromise of an element of risk that their bargain might not be as advantageous to them as litigation might have been is inherent in the very concept of compromise. This is a circumstance which the Court must bear in mind when it considers a complaint by a dissatisfied party that, had he not labored under an erroneous belief or been ignorant of certain facts, he would not have entered into the settlement agreement."

12. The respondent also referred to Slip Knot Investments 777 (Pty) Ltd v Du Toit[3] as authority for the proposition that where there was no material misrepresentation made by the other party and the error was a unilateral one, *iustus error* could not be relied upon.

13. Of course, in the present matter, there was no representation made by the respondent. The consent order is clearly and unequivocally in its terms an

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[2] 1978 (1) SA 914 (A) at 923C-D

[3] 2011 (4) SA 72 (SCA) - *"A person who is induced to sign a suretyship agreement by the fraud or misrepresentation of a third party, and who is unaware of the nature of the document he is signing, will nevertheless be bound by the agreement if the lender is innocent and unaware of the surety's mistake". The lender would in such a case be entitled to rely on the appearance of liability created by the surety's signature, and the surety would not be entitled to set up his unilateral mistake to escape liability under the agreement."*

admission of liability for what occurred on 3 November 2014. It cannot be ignored that the applicant was represented and advised by senior counsel at the time that he decided to consent to the order.

14. The applicant must have fully briefed his counsel on the circumstances of the matter and also of the fact that besides the civil claim, he was also facing criminal charges. It seems to me as a probability that the various postponements of the civil action to which the applicant had referred, had been sought so that he would not have to find himself in the invidious position of having to testify in a civil action in the high court under oath and to thereafter appear subsequently in a criminal court to face charges relating to the same series of events.

15. It is improbable that the applicant's senior counsel advised him to consent to the order, if his doing so was in conflict with the instructions that he had given to his senior counsel.

16. On the probabilities the applicant advertently consented to the order in the civil matter to avoid having to testify. Having achieved this, he then, once the respondent had testified and been cross examined in the criminal trial, sought to resile from the agreement, having already received the benefit that he had sought in consenting. There was in the circumstance's no *"Damascus moment".*

17. The bringing of the present application seems to me to have been entirely opportunistic and nothing more than a further attempt to delay. The conduct of the applicant in failing to oppose the application to strike out, failing to file a replying affidavit and having to be compelled to file his heads of argument lead to the ineluctable conclusion that the application was not made *bona fide* and that there was in fact no *iustus error.*

18. For these reasons, I made the orders that I did, which orders include an order that the costs of this application be paid by the applicant on the punitive scale as between attorney and client.

19. The order that I granted is annexed hereto marked "X".

"X" annexes
23/11/2022

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

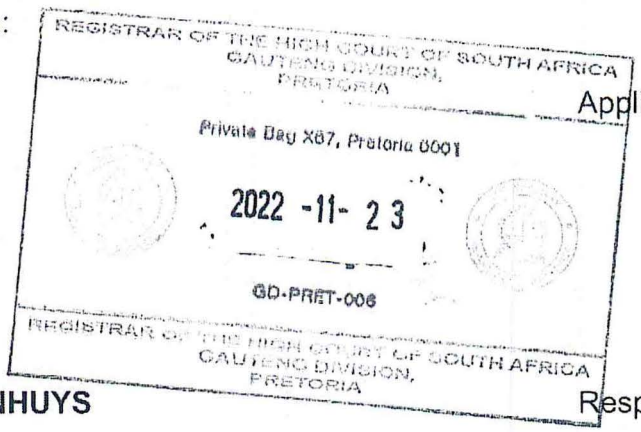
Case number: 65553/14

BEFORE THE HONOURABLE JUSTICE MILLAR J

23 November 2022, Court 4G

In the matter between:

DEON DE BEER Applicant/Defendant



AND

LEENDERT GELDENHUYS Respondent/Plaintiff

DRAFT ORDER

HAVING read the papers, heard the parties and considered the matter, the following order is made:

1. The following portions of the founding affidavit of Mr Deon de Beer deposed to on the 16th day of May 2019 is struck out:

   1.1. The last sentence of paragraph 5.7;

1.2. Paragraph 5.13 including annexure DDB2;

1.3. Paragraph 5.14;

1.4. Paragraph 5.15.

2. The application for the rescission of the order dated 7 March 2017 is dismissed.

3. The applicant is ordered to pay the costs of the application, including the costs of the striking out application, on an attorney and client scale.

BY ORDER

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
Private Bag X67, Pretoria 0001
2022 -11- 23
GD-PRET-008
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

REGISTRAR

Counsel for
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Instructed by De Ridder Attorneys

Counsel for
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Instructed by Lourens & Schwartz Attorneys

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